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268 NLRB No. 17

D--1179
Ashland, Hazard, and
Pikeville, KY
Williamson, WV
Ironton, OH

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR ~~RELATIONS BOARD~~

THE F. A. BARTLETT TREE EXPERT CO.

and

Case 9--CA--19512

ALUMINUM, BRICK AND GLASS WORKERS
INTERNATIONAL UNION, AFL--CIO--CLC

DECISION AND ORDER

Upon a charge filed on 4 April 1983 by Aluminum, Brick and Glass Workers International Union, AFL--CIO--CLC, herein called the Union, and duly served on The F. A. Bartlett Tree Expert Co., herein called Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 9, issued a complaint on 2 May 1983 against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge and complaint and notice of hearing before an administrative law judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that on 29 November 1982, following a Board election in Case 9--RC--14096, the Union was duly certified as the exclusive collective-bargaining representative of Respondent's employees in the unit found appropriate;[1] and that, commencing on or about 7 January 1983, and at all times thereafter, Respondent has refused, and continues to date to refuse, to bargain collectively with the Union as the exclusive bargaining representative, although the Union has requested and is requesting it to do so. On 12 May 1983 Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint.

On 31 May 1983 counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on 2 June 1983, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent thereafter filed a response to the Notice To Show Cause and Cross-Motion for Summary Judgment.

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[1] Official notice is taken of the record in the representation proceeding, Case 9--RC--14096, as the term ''record'' is defined in Secs. 102.68 and 102.69(g) of the Board's Rules and Regulations, Series 8, as amended. See LTV Electrosystems, Inc., 166 NLRB 938 (1967), enfd. 388 F.2d 683 (4th Cir. 1968); Golden Age Beverage Co., 167 NLRB 151 (1967), enfd. 415 F.2d 26 (5th Cir. 1969); Intertype Co. v. Penello, 269 F.Supp. 573 (D.C.Va. 1967); Follett Corp., 164 NLRB 378 (1967), enfd. 397 F.2d 91 (7th Cir. 1968); Sec. 9(d) of the NLRA, as amended.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Summary Judgment

In its response to the Notice To Show Cause and Cross-Motion for Summary Judgment, Respondent denies the validity of the Union's certification on grounds that the Board erred in the underlying representation case (1) by directing an election where the petition was filed less than 6 months after the Board had revoked the Union's prior certification in essentially the same unit because the Union disclaimed interest in representing such employees; (2) by finding appropriate the districtwide unit that the Union sought and thus rejecting Respondent's argument that only single location units are appropriate; and (3) by granting the Union's request to amend the petition to reflect its merger with another labor organization, where the Union did not demonstrate a new showing of interest among employees. Accordingly, Respondent urges that the Board deny the General Counsel's Motion for Summary Judgment and grant the Cross-Motion for Summary Judgment that it has filed here. Counsel for the General Counsel contends that Respondent is raising issues which were considered and resolved in the representation case, and that this it may not do. We agree with the General Counsel.

Our review of the record herein, including the record in Case 9--RC--14096, discloses that the Regional Director issued his Decision and Direction of Election in Case 9--RC--14096 on 16 August 1982. Thereafter, Respondent filed with the Board a request for review in which it disputed the Regional Director's findings on the timeliness of the petition and the appropriate unit. On 9 September 1982 the Board denied the request for review. Thereafter, the Union moved to amend the petition in Case 9--RC--14096 to reflect its 1 September 1982 merger with another labor organization. In response, the Employer filed a motion to dismiss the petition because the Union had not demonstrated a new showing of interest in the unit found appropriate. On 13 October 1982, the Regional Director issued an order granting the Union's motion to amend the petition and denying that motion the Employer had filed. The Employer then filed a request for review of the Regional Director's rulings there. Subsequently, on 9 November 1982, the Board again denied the Employer's request for review.

The election in Case 9--RC--14096 was conducted on 17 November 1982. The tally of ballots shows that, of approximately 96 eligible voters, 88 cast ballots, of which 56 were for, and 32 against, the Union; there were 6 challenged ballots, an insufficient number to affect the results. Accordingly, on 29 November 1982, the Regional Director certified the Union as the exclusive collective-bargaining representative of Respondent's employees in the unit found appropriate.

It thus appears that, by raising matters that the Board previously has resolved, Respondent is attempting to raise issues which were raised and decided in the underlying representation case.[2]

It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.[3]

All issues raised by Respondent in this proceeding were or could have been litigated in the prior representation proceeding, and Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence, nor does it allege that any special circumstances exist herein which would require the Board to reexamine the decision made in the representation proceeding. We therefore find that Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding. Accordingly, we grant the General Counsel's Motion for Summary Judgment and deny Respondent's Cross-Motion for Summary Judgment.[4]

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[2] For these reasons, we reject Respondent's alternate contention that this case should be remanded for a hearing before an administrative law judge on the issues it has raised.

[3] See Pittsburgh Plate Glass Co. v. N.L.R.B., 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

[4] While admitting that the parties exchanged letters on the dates set forth in the complaint, Respondent's answer generally denies that the Union has requested or that it has refused to bargain. Attached to the General Counsel's Motion for Summary Judgment is a letter, dated 20 December 1982, from the Union to Respondent requesting bargaining and another letter, dated 7 January 1983, from Respondent (continued)

On the basis of the entire record, the Board makes the following:

Findings of Fact

I. The Business of Respondent

The F. A. Bartlett Tree Expert Co., a Connecticut corporation, maintains offices and places of business in Ashland, Hazard, and Pikeville, Kentucky; Williamson, West Virginia; and Ironton, Ohio, where it is engaged in tree surgery, tree trimming, and the clearing of trees and brush from rights-of-way owned by public utility companies. During the 12-month period prior to 2 May 1983, a period representative of all times material herein, Respondent, in the course and conduct of its business operations, purchased and received at its Kentucky places of business goods and materials valued in excess of 50,000 directly from points located outside the Commonwealth of Kentucky.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

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[4] to the Union refusing to do so. In its answer to the Notice To Show Cause, Respondent neither alludes to nor controverts the foregoing statements nor the letters attached to the Motion for Summary Judgment. Thus, factual allegations in the complaint concerning the request and refusal to bargain stand uncontroverted. Schwartz Brothers, Inc., and District Records, Inc., 194 NLRB 150, fn. 5 (1971); The May Department Stores Company, 186 NLRB 86 (1970); and Carl Simpson Buick, Inc., 161 NLRB 1389 (1966).

Chairman Dotson did not participate in the underlying representation decisions and by agreeing to this Order does not necessarily indicate his concurrence in the prior decisions.

II. The Labor Organization Involved

Aluminum, Brick and Glass Workers International Union, AFL--CIO--CLC, is a labor organization within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices

A. The Representation Proceeding

1. The unit

The following employees of Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

> All employees employed by the Employer within its Kentucky District, including the garage mechanic in Ironton, Ohio; but excluding temporary employees, technical employees, all office clerical employees and all professional employees, guards, working crew foremen and all other supervisors as defined in the Act.

2. The certification

On 17 November 1982 a majority of the employees of Respondent in said unit, in a secret-ballot election conducted under the supervision of the Regional Director for Region 9, designated the Union as their representative for the purpose of collective bargaining with Respondent.

The Union was certified as the collective-bargaining representative of the employees in said unit on 29 November 1982, and the Union continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

B. The Request To Bargain and Respondent's Refusal

Commencing on or about 20 December 1982, and at all times thereafter, the Union has requested Respondent to bargain

collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described unit. Commencing on or about 7 January 1983, and continuing at all times thereafter to date, Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in said unit.[5]

Accordingly, we find that Respondent has, since 7 January 1983, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit and that, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Union

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[5] See fn. 2, supra.

as the exclusive representative of all employees in the appropriate unit, and, if an understanding is reached, embody such understanding in a signed agreement.

In order to ensure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of certification as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See Mar-Jac Poultry Company, Inc., 136 NLRB 785 (1962); Commerce Company d/b/a Lamar Hotel, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817; Burnett Construction Company, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

Conclusions of Law

1. The F. A. Bartlett Tree Expert Co. is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Aluminum, Brick and Glass Workers International Union, AFL--CIO--CLC, is a labor organization within the meaning of Section 2(5) of the Act.

3. All employees employed by the Employer within its Kentucky District, incuding the garage mechanic in Ironton, Ohio; but excluding temporary employees, technical employees, all office clerical employees and all professional employees, guards,

working crew foremen and all other supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since 29 November 1982 the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about 7 January 1983, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, The F. A. Bartlett Tree Expert Co., Ashland,

Hazard, and Pikeville, Kentucky; Williamson, West Virginia; and Ironton, Ohio, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Aluminum, Brick and Glass Workers International Union, AFL--CIO--CLC, as the exclusive bargaining representative of its employees in the following appropriate unit:

> All employees employed by the Employer within its Kentucky District, including the garage mechanic in Ironton, Ohio; but excluding temporary employees, technical employees, all office clerical employees and all professional employees, guards, working crew foremen and all other supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its facilities in Ashland, Hazard, and Pikeville, Kentucky; Williamson, West Virginia; and Ironton,

Ohio, copies of the attached notice marked ''Appendix.''[6] Copies of said notice, on forms provided by the Regional Director for Region 9, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

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[6] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading ''POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD'' shall read ''POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD.''

(c) Notify the Regional Director for Region 9, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

Dated, Washington, D.C. 31 October 1983

Donald L. Dotson, Chairman

Don A. Zimmerman, Member

Robert P. Hunter, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Aluminum, Brick and Glass Workers International Union, AFL--CIO--CLC, as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

All employees employed by the Employer within its Kentucky District, including the garage mechanic in Ironton, Ohio; but excluding temporary employees, technical employees, all office clerical employees and all professional employees, guards, working crew foremen and all other supervisors as defined in the Act.

THE F. A. BARTLETT TREE EXPERT CO.

(Employer)

Dated ---------- By ----------
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Federal Office Building, Room 3003, 550 Main Street, Cincinnati, Ohio 45202, Telephone 513--684--3663.